Editor's note: Reconsideration granted; hearing ordered by Order dated Sept. 21, 1993. See 123 IBLA 239A th. C below.

STATE OF ALASKA (MABEL S. BROWN)

IBLA 88-481 Decided June 9, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment F-15625.

Set aside and remanded.

1. Alaska: Native Allotments--Applications and Entries: Filing

A Government contest of a Native allotment application is appropriate when the application bears datestamps well beyond the Dec. 18, 1971, filing deadline and the applicant's evidence of timeliness consists solely of a two-page BIA form letter, page 1 of which acknowledges receipt of an unspecified Native allotment application and page 2 of which consists only of the applicant's name, address, and a date within the deadline.

2. Alaska: Native Allotments

A Government contest of a Native allotment application is appropriate when the record reveals that a road in public use crosses lands described by the application, thus calling into question whether the applicant has established notorious, exclusive, and continuous use and occupancy of the lands.

APPEARANCES: E. John Athens, Jr., Esq., Fairbanks, Alaska, for appellant; David C. Fleurant, Esq., Anchorage, Alaska, for appellee.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

The State of Alaska has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 1, 1988, approving Native allotment application F-15625. At issue in this appeal is BLM's finding that the applicant, Mabel S. Brown, satisfied the requirements of the Act of May 17, 1906, 1/ as to a 36-acre parcel (parcel A) 2/ in secs. 27 and 28, T. 18 N., R. 9 E., Kateel River Meridian.

1/ This statute, set forth at 43 U.S.C. §§ 270-1 through 270-3 (1970), was repealed on Dec. 18, 1971, by 43 U.S.C. § 1617(a) (1988) subject to applications pending on that date.

2/ Brown's application also described parcels B and C. No argument is raised by the State to Brown's use and occupancy of parcel B. By decision

The Bureau of Indian Affairs (BIA) filed Native allotment application F-15625 on behalf of Mabel S. Brown on March 13, 1972. Legislative approval of this application pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(1) (1988), was denied by the filing of a protest on June 1, 1981, by the State of Alaska. This protest stated that lands described by F-15625 were used as an existing airstrip, existing trail, and as a public easement to be reserved under section 17(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1616(b) (1976).

BLM found that parcel A was crossed by a road (EIN 10a C3, D9 L) 60 feet in width connecting Kobuk airport to Dahl Creek airstrip. Finding the State's protest to be valid, 3/ BLM proceeded to adjudicate Brown's

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fn. 2 (continued)
dated Oct. 9, 1985, BLM found that Brown had satisfied the use and occupancy requirements for parcel C. A Native allotment for parcel C was issued to Brown on Feb. 3, 1987.

3/ In its Answer of Mar. 1, 1990, Brown belatedly challenges BLM's finding in this regard, and argues that the State's protest did not describe parcel A, but rather parcel C. See note 2 supra. Such a protest should be dismissed, Brown contends, and parcel A must be legislatively approved.

The State's protest of June 1, 1981, stated that land described in application F-15625 was used for an "existing airstrip, existing trail,
and public easement to be reserved pursuant to Section 17(b) of the Alaska Native Claims Settlement Act." (Emphasis added.) The protest further stated, "This is an existing constructed public access route, transportation facility or corridor" and noted that public use documentation was attached. The public use documentation focused upon the need for stream access and two airstrips and did not address, in any detail, the "existing trail" mentioned in the protest.

Section 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), denied legislative approval of an allotment application which is protested by the State of Alaska if:

"the land described in the allotment application is necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist."

Like BLM, we have no difficulty in finding that parcel A is crossed
by an "existing trail" (EIN 10a C3, D9 L) leading to Dahl Creek airstrip. As of the date of the protest, this airstrip was the subject of a 20-year airport lease granted by BLM to the State. The failure of Brown to focus upon the protest's mention of an "existing trail" and "public easement to
be reserved under Section 17(b)" of ANCSA renders her challenge nugatory. It is likely that the public use documentation that Brown relies upon was offered by the State in the belief that parcel C occupied part of Dahl Creek airstrip, but this documentation need not obscure the protest's mention of an existing trail and future public easement.

application for parcel A in accordance with 43 U.S.C. § 1634(a)(5) (1988), and its findings occasioned the instant appeal. These findings are:

> The application, which was before the Department on December 18, 1971, claims use and occupancy since birth in 1898, for approximately 160 acres of unsurveyed land. * * *.
>
> Based upon adjudication of Parcel A of the application, this office has determined the applicant has used the lands applied for and satisfies the use and occupancy requirements of the Act of May 17, 1906, as amended. At the time the claim was initiated, the lands were vacant, unappropriated, and unreserved. Therefore, Native allotment application F-15625, Parcel A, is hereby approved as to the land described above.

In its statement of reasons on appeal, the State makes four arguments. It begins by charging that the Department lacks jurisdiction to consider application F-15625 because the record gives no indication that the application was pending before the Department on December 18, 1971, the deadline for filing such applications. No affidavits attest to the pendency of F-15625 before the Department on this date, appellant points out, and the only date-stamps on the application fall well after this deadline.

The applicant has responded to this argument by submitting a photocopy of a two-page form letter on BIA stationery. Page 1 of this photocopy consists of an undated and unaddressed form letter signed by a BIA realty officer which confirms receipt of an unspecified Native allotment application ("We have received your application for Native allotment. It will be processed and filed as soon as possible. * * * You will be notified when your application has been filed * * *"). Page 2 bears the name and address of Mabel Brown and the date, June 24, 1971. No other word or mark appears on page 2.

The applicant states that this letter, obtained from BIA's file, establishes "beyond a preponderance of the evidence" that application F-15625 was pending before the Department on or before December 18, 1971. In support, Brown cites Nora E. Konukpeak (On Reconsideration), 60 IBLA 394 (1981), for the proposition that an application required to be filed with BLM, but filed instead with BIA prior to December 18, 1971, will be deemed to be "pending" on that date.

BLM's decision of March 1, 1988, states only that Brown's application was "before the Department" on December 18, 1971. The basis for this conclusion is not apparent from the application, and no response to appellant's charge has been forthcoming from BLM.

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fn. 3 (continued)

Our resolution of Brown's challenge to the validity of the State's protest is sufficient answer to the State's motions of Mar. 6, 1990.

[1] In Heirs of Linda Anelon, 101 IBLA 333, 336 (1988), the Board summarized the evidence required to establish the pendency of a Native allotment application. This guidance first appeared in a memorandum of October 18, 1973, from Assistant Secretary Horton to BLM:

> Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency, or division time stamp, the affidavit of any bureau, division, or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

We find that neither Brown's application nor the two-page form letter on BIA stationery satisfies the guidance set forth in Anelon. In light of this record, we conclude that there is sufficient doubt as to the timeliness of Brown's application to require a Government contest. State of Alaska, 85 IBLA 196, 203 (1985); Katmailand, Inc., 77 IBLA 347, 354 (1983).

Appellant's three remaining arguments are interrelated and may be addressed jointly. These three arguments are: Mabel Brown did not exclusively use and occupy land covered by the road connecting Kobuk airport to Dahl Creek airstrip; BLM's failure to consider the public need for this road was an abuse of discretion; and a Government contest of application F-15625 is required when conflicting evidence of use and occupancy is present.

[2] The road referred to in the statement of reasons is not in dispute. The applicant acknowledges that Kobuk-Dahl Creek road crosses parcel A and remarks that it has been improved by the State of Alaska with her consent. 4/ The record suggests that Brown's use of parcel A began in the early part of this century and predated the road. 5/ This use is said to include fishing, berry picking, hunting, and rat trapping. 6/ Appellant estimates that Kobuk-Dahl Creek road has been in existence "since about 1930." 7/

The State argues that Kobuk-Dahl Creek road was used as a public trail and was considered and accepted by Mabel Brown as such. This use, appellant contends, contrasts with the use and occupancy requirements set forth in United States v. Flynn, 53 IBLA 208, 227, 88 I.D. 373, 383 (1981), wherein the Board held:

> Native occupation * * * was required to be "notorious, exclusive and continuous, and of such a nature as to leave visible evidence

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4/ By letter dated June 28, 1979, Brown notified the State that she had no objection to granting the State a right-of-way to construct a permanent roadway across her allotment.
5/ BLM land report for parcel A, Jan. 13, 1975, at 2.
6/ Id. at 1.
7/ Statement of reasons, Dec. 28, 1988, at 6.

thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the apparent extent thereof must be reasonably apparent." United States v. 10.95 Acres of Land in Juneau, 75 F. Supp 841, 844 (D. Alaska 1948).

In this case it is undisputed that Brown did not exclusively use and occupy the trail since 1930, the State argues, and that any subjective intent she had to do so was not reasonably apparent, given the continuous public use after that date and her express nonobjection to the upgrade of the trail by the State in the 1970's. Brown's nonqualifying use after 1930 vitiates any effective qualifying use she may have achieved prior to that date, appellant suggests. 8/

In response, Brown quotes from BLM's field report of January 13, 1975:

> Everyone in Kobuk Village knows Ms. Mabel Brown. She is one of the older women in the village and much respected. The whole village will verify that she has used and occupied this parcel [A] for more than the required five years. Her use has been exclusive or potentially exclusive and there are no conflicts. The village recognized this parcel as belonging to Ms. Mabel Brown.

Public use of Kobuk-Dahl Creek road was minimal prior to 1972, Brown contends, because Kobuk had but one jeep, one pug, three motorcycles, and one old ambulance. All freight for Kobuk comes into the village airstrip, not Dahl Creek airstrip. 9/ Use of the road by villagers occurred primarily south of parcel A, where the graveyard and berry picking areas are located. 10/ Moreover, Brown argues, most of the public use of the road is by Kobuk residents who, like the State, have long recognized parcel A as her land.

In Edward Nickoli, 90 IBLA 273, 276 (1986), the Board described as an "apparent inconsistency" BLM's approval of a Native allotment parcel crossed by the Iditarod National Historic Trail. 11/ This description was used because the presence of a public road within an approved allotment appeared to conflict with a Native's duty to establish "notorious, exclusive, and continuous" occupancy of a parcel. (Emphasis supplied.) We find this description also appropriate in the instant case.

BLM's decision of March 1, 1988, attempts to resolve this apparent inconsistency by noting that Kobuk-Dahl Creek road was constructed after

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8/ Id. at 8.
9/ Answer to statement of reasons, Mar. 1, 1990, at 7-8.
10/ Id.
11/ In Clarence Lockwood, 95 IBLA 261 (1987), the Board relied upon Nickoli in holding that BLM may reserve a right-of-way for the Iditarod National Historic Trail through lands in an approved Native allotment application. On Feb. 16, 1989, the United States District Court for the District of Alaska reversed Lockwood on this point. Degnan v. Hodel, No. A87-252 Civil.

Brown's use began. Relying on this fact and Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987), BLM concluded that Brown's allotment need not be subject to an easement.

In Golden Valley Electric Association (On Reconsideration), the Board held that a Native's completion of the required 5 years of use and occupancy, coupled with the timely filing of a Native allotment application, vested in the Native a preference right which had preference over competing applications filed prior to the allotment application. 98 IBLA at 205. In that case, the competing application was a 50-year right-of-way granted by BLM to Golden Valley Electric Association prior to the filing of a Native allotment application describing the same lands. Key to the result was the fact that the Native had commenced use and occupancy of the disputed area prior to the right-of-way grant.

Golden Valley Electric Association (On Reconsideration) is distinguishable from the instant facts because the record there contained no suggestion that the Native had ceased to use and occupy the parcel in a qualifying manner. 12/ The instant facts suggest that Brown, having used and occupied parcel A in a qualifying fashion for over 5 years, ceased such use and occupancy at least as to that area occupied by the road. Whether this suggestion is fact should be determined in a Government contest. This disposition is consistent with prior instances when contests were ordered because of conflicting or inconclusive evidence of required use. See, e.g., National Park Service, 117 IBLA 247 (1991).

United States v. Flynn, supra, makes clear that

> absent the filing of an application for allotment, cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land, terminated all protected rights under both the allotment and permissive occupancy statutes and restored the land to its original status of vacant and unappropriated land, regardless of the existence of any "intent" to permanently abandon such use or occupancy.

53 IBLA at 238, 88 I.D. at 389. This principle shall guide BLM's contest insofar as the contest focuses upon Brown's use and occupancy of parcel A.

If in deciding this issue at the contest, the Judge concludes that the presence of Kobuk-Dahl Creek road within parcel A does not conflict with Brown's use and occupancy of this parcel, the Judge shall set forth his reasons for such conclusion. Having so concluded, the Judge should

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12/ Moreover, the facts in Golden Valley Electric Association supported a finding that the applicant's use and occupancy was at least potentially exclusive of others. A close reading of this case reveals that the Native had conveyed a right-of-way to the appellant utility, and thus the utility's use of the land was approved by the Native.

consider whether Degnan v. Hodel, No. A87-252 Civil (D. Alaska Feb. 16, 1989), precludes BLM's reservation of a right-of-way through parcel A.

In summary, we set aside BLM's decision of March 1, 1988, and direct the agency to initiate a Government contest against application F-15625. This contest shall determine whether application F-15625 was timely filed with the Department and whether the applicant ceased qualifying use and occupancy of parcel A prior to filing her application. The contest complaint shall be served upon the State and NANA Regional Corporation and upon filing proper motions, these bodies shall be allowed to intervene.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is set aside and the case is remanded to BLM for initiation
of a Government contest.

James L. Byrnes
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

September 21, 1993

IBLA 88-481	:	F-15625
	:	
STATE OF ALASKA	:	Native Allotment
	:	
	:	Petition for Reconsideration
	:	
	:	Petition Granted;
	:	Hearing Ordered

ORDER

The Bureau of Land Management (BLM) and the heirs of Mabel Brown have each filed a petition for reconsideration of this Board's opinion in State of Alaska (Mabel S. Brown), 123 IBLA 233 (1992). In that case, the Board set aside and remanded a BLM decision, dated March 1, 1988, approving Brown's Native allotment application F-15625. In addition, the Board directed BLM to initiate a Government contest against the application to "determine whether application F-15625 was timely filed with the Department and whether the applicant ceased qualifying use and occupancy of parcel A prior to filing her application." Id. at 239.

In their petitions, BLM and Brown present the affidavits of Audrey L. Tuck, Realty Specialist, Bureau of Indian Affairs (BIA), Anchorage, and Niles C. Cesar, Area Director, Juneau Area Office, BIA. These affidavits describe how Native allotment applications were processed during 1971-72, and each is presented to show that Brown's application was, in fact, timely filed.

Regulation 43 CFR 4.403 provides that the Board may reconsider a decision "in extraordinary circumstances for sufficient reason." The preamble to this regulation makes clear that the phrase "extraordinary circumstances" was retained to reinforce the Board's expectation that parties will make complete submissions in a timely manner during the appeal, not afterward on reconsideration. In general, the Board will deny a petition that merely restates arguments previously made or contains new material with no explanation for the petitioner's failure to submit such material while the appeal was pending. 52 FR 21307 (June 5, 1987).

All of the information in the Tuck and Cesar affidavits could have been presented to the Board during the initial briefing of the appeal. The issue of timeliness was squarely posed by the State. Brown answered that a 2-page form letter showed that application F-15625 was timely filed. BLM did not appear. BLM and Brown now express surprise at the Board's discussion of timeliness, but neither cites a case decided in a contrary manner. No basis for granting the petitions for reconsideration is provided by the Tuck and Cesar affidavits, despite the obvious relevancy of these materials.

IBLA 88-481

A sounder basis for the petitions is the argument that the Board incorrectly ordered a Government contest on the issues of timeliness and Brown's use and occupancy of parcel A. BLM contends that if a Government contest were issued alleging untimeliness, the Government would have no evidence or witnesses to put on to show anything but a timely filing of the application. If the Board believes there is an unavoidable factual issue, BLM states, it can refer the matter directly for a hearing. A referral for hearing is more appropriate than a Government contest when a third party is alleging a defect and BLM believes its decision is correct and has no evidence to prove the contrary, BLM argues.

BLM also argues that "[n]o matter how the case is viewed, it was not appropriate to order a government contest of all of parcel A. The State of Alaska only challenged the portion of the allotment crossed by a road it says is used by the public" (Memorandum in Support of Petition for Reconsideration, Aug. 12, 1992, at 12). It was not the intention of the Board, in ordering a Government contest on the issue of use and occupancy, to focus on acreage beyond that occupied by Kobuk-Dahl Creek Road.

The Board's decision is amended to require that a hearing, rather than a Government contest, be conducted to examine whether Brown's application F-15625 was timely filed and whether Brown ceased qualifying use and occupancy of that portion of parcel A occupied by Kobuk-Dahl Creek Road. The affidavits of Tuck and Cesar may be offered at such hearing. The heirs of Brown shall have the burden to show that application F-15625 was timely filed with the Department. The State of Alaska shall have the burden of showing that Brown ceased qualifying use of that portion of parcel A occupied by Kobuk-Dahl Creek Road.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted, and State of Alaska (Mabel S. Brown) is amended to reflect the discussion above and the case is referred to the Hearings Division.

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James L. Byrnes
Chief Administrative Judge

I concur:

_____
David L. Hughes
Administrative Judge

IBLA 88-481

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